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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FEDERAL ELECTION COMMISSION
SECRETARIAT

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5625
Date Complaint Filed: Dec. 6, 2004
Date of Notification: Dec. 14, 2004
Last Response Received: Feb. 14, 2005
Date Activated: July 1, 2005
EPS:
Expiration of SOL: Nov. 8, 2009

COMPLAINANT: National Geographic and Political Software
RESPONDENT: Aristotle International Inc.
RELEVANT STATUTE: 2 U.S.C. § 438(a)(4)
RELEVANT REGULATION: 11 C.F.R. § 104.15(a)
INTERNAL REPORTS CHECKED: None
FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

In this matter, National Geographic and Political Software ("NGP") alleges that Aristotle International Inc. ("Aristotle") downloaded data from the Federal Election Commission website and incorporated the data into an upgrade of its Campaign Manager 5 ("CM5") software product. NGP asserts that Aristotle's action contravenes the Federal Election Campaign Act of 1971, as amended ("the Act"), as articulated by the Commission in Advisory Opinion ("AO") 2004-24. As discussed in more detail below, we recommend that the Commission find reason to believe that Aristotle knowingly and willfully violated 2 U.S.C. § 438(a)(4) by using FEC data for a commercial purpose.

II. FACTS

On June 10, 2004, NGP requested an AO regarding a proposed upgrade to its "flagship" software product, NGP Campaign Office. *See* AO Request of NGP, dated June 10, 2004. NGP proposed to "offer our clients the ability to automatically see the contributions that their donors have made to other candidates, PACs and party organizations." *Id.* at 1. This feature would allow campaigns to ask their donors for the maximum amount of money that the donor has given to other campaigns in the past. *Id.* at 1-2.

On August 5, 2004, the Commission released draft language for AO 2004-24 concluding that NGP's proposed use of FEC data would violate 2 U.S.C. § 438(a)(4). *See* AO 2004-24 Draft, dated August 5, 2004. In a comment submitted regarding the draft AO, Aristotle argued that, while NGP's blanket request to use FEC data should be denied, the Advisory Opinion should note that the legality of using such data should be based on factual and contextual considerations. *See* Comment, Proposed AO 2004-24, dated August 11, 2004. Aristotle argued that it is possible "to structure limited access to certain elements of the data in a way that balances the competing interests" of disclosure and the protection of privacy. *Id.* at 4.

In the final language of AO 2004-24, the Commission denied NGP's request to use FEC data in an upgrade to its software. Specifically, the AO stated that "[y]our proposed sale or inclusion of information about contributors (other than information about political committees that are contributors) obtained from the FEC's public records in NGP Campaign Office would be prohibited under the Act's restriction on the sale or use of such contributor information." AO 2004-24 at 2.

Several months after the AO was issued, the Commission received a complaint from NGP claiming that Aristotle had developed software that ran afoul of the Act as interpreted in

1 AO 2004-24. *See* Complaint of NGP, dated December 1, 2004 (hereinafter "Compl."). As part
2 of its complaint, NGP included four exhibits that were taken from Aristotle's marketing
3 materials. The first exhibit comes from an Aristotle power point presentation which contains the
4 following quote: "When soliciting a contribution, Campaign Manager 5 will tell you exactly how
5 much the prospect has given to others, which suggests how much you should ask for." Compl.,
6 Exhibit 1. NGP argues that this exhibit demonstrates that CM5 violates the Act "as spelled out
7 in AO 2004-24." Compl. at 1. NGP also points out that another marketing document created by
8 Aristotle references AO 2004-24, "demonstrating that they [Aristotle] are aware of the
9 prohibition on the sale or use of individual contributor data ... but have chosen to ignore it." *Id.*
10 at 2, and Exhibit 4.

11 In response to the complaint, Aristotle argues that NGP is incorrect to claim that
12 "Aristotle was doing what the FEC had prevented NGP from doing." *See* Response from
13 Aristotle, dated February 14, 2005 (hereinafter "Resp."), at 1. Aristotle emphasizes the fact that
14 its software does not allow a customer to view records for any individuals not already in the
15 customer's database and that donor contact information is not derived from FEC data. *Id.* at 9-
16 10. Aristotle asserts that the purpose of its software upgrade is to help Aristotle's customers
17 comply with Commission regulations and also argues that the Act allows broad use of FEC data.

18 Aristotle argues that CM5 utilizes contributor data so that campaigns can ensure that the
19 contributions they accept comply with all election laws and regulations. Resp. at 10. Aristotle
20 suggests that customers check "aggregate contributions to insure that limits are not exceeded."
21 *Id.* Aristotle also suggests that campaigns may want to see to whom their potential donors have
22 given, in order to exclude donors who gave to candidates with whom the campaigns do not agree.
23 Aristotle contends that the materials in the complaint suggesting that customers use CM5 for

solicitation purposes refer to state data not covered by the Act, but that "[o]ut of an abundance of caution" Aristotle has modified the language "to clarify that reference to FEC data is expressly for the campaign 'to easily conform [its] fundraising to state and federal compliance standards.'" *Id.* at 13.

Aristotle also argues that its use of FEC data falls within the acceptable range of uses as articulated by the Commission and court precedent. Aristotle attempts to distinguish its use of Commission data from NGP's purported intended use addressed in AO 2004-24, by focusing on language that was changed in the final draft. The draft AO contained the following sentence: "Such use is for a commercial purpose because NGP is a for-profit company that sells and services NGP Campaign Office for a profit." Draft AO at 4. In the final version of the AO, the sentence is truncated to read simply: "Such use is for a commercial purpose." Aristotle asserts that "[t]he removal of such language was significant, for it underscored the FEC's commitment to a context-based analysis in each case involving publication or use of individual contributor data." *Id.* at 8.

III. LEGAL ANALYSIS

The Act requires the Commission to make disclosure reports available to the public within 48 hours of the Commission's receipt of such reports; however, "any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes...." 2 U.S.C. § 438(a)(4). Title 11 of the Code of Federal Regulations prohibits use of data from reports "for any commercial purpose." 11 C.F.R. § 104.15(a). The regulations articulate an exception for the use of FEC data in "newspapers, magazines, books or other similar communications ... as long as the principal purpose of such communications is not to communicate any contributor information listed on

1 such reports for the purpose of soliciting contributions or for other commercial purposes."

2 11 C.F.R. § 104.15(c).

3 In evaluating NGP's request for an Advisory Opinion, the Commission found those
4 circumstances constituted a prohibited commercial use. AO 2004-24 at 3. When drafting that
5 Advisory Opinion, the Commission reviewed the reasoning in the most recent case on point. See
6 *Federal Election Comm'n v. Legi-Tech, Inc.*, 967 F. Supp. 523 (D.D.C. 1997). In *Legi-Tech*, the
7 United States District Court for the District of Columbia granted the Commission's motion for
8 summary judgment, finding that the sale of subscriptions to Legi-Tech's Campaign Contribution
9 Tracking System ("CCTS") violated the commercial use provision of section 438(a)(4). Legi-
10 Tech sold to subscribers lists of donors compiled from FEC data so that subscribers could solicit
11 those donors. The court specifically found Legi-Tech in violation of the commercial purposes
12 clause of the Act. *Id.* at 528; see contra *Federal Election Comm'n v. Political Contributions*
13 *Data, Inc.*, 943 F.2d 190 (2d Cir. 1991).¹

14 Aristotle's use of contributor data appears to constitute a commercial use as articulated by
15 the Commission in AO 2004-24. Aristotle is conducting activity that is identical to that
16 addressed in AO 2004-24: collecting contributor information from the Commission's public
17 records and including it as part of a software upgrade. AO 2004-24 at 3. The AO labels the use
18 of contributor information described by NGP's request as prohibited based on its commercial
19

¹ In *Political Contributions Data, Inc.*, 943 F.2d 190, the Second Circuit found Political Contributions Data's ("PCD") use of FEC data permissible. PCD collected and sorted FEC data by congressional district and employer and sold the lists. The court noted that the lists did not contain contributors' addresses or phone numbers, and that the lists did contain disclaimers warning against unauthorized use of such data. Aristotle cites this case for the proposition that a for-profit or commercial entity can, under certain circumstances, sell data collected from the Commission. PCD represents a less restrictive interpretation of section 438(a)(4) and was criticized by the D.C. District Court in *Legi-Tech*. Aristotle is located in Northern Virginia, incorporated in Washington, D.C., and most likely has conducted business in Virginia and in Washington, D.C. Therefore, it is doubtful that Second Circuit caselaw would be controlling, unless Aristotle conducted significant business in New York.

1 purpose. Thus, even if Aristotle intended its clients to use the contributor information solely for
2 compliance purposes, Aristotle itself would have used the data for commercial purposes, *i.e.* to
3 sell its software.

4 The change in language between the draft version of AO 2004-24 and the final version
5 does not support Aristotle's interpretation of the Act. While Aristotle was correct to note that the
6 change removed the reasoning that the violation was based on NGP's status as a for-profit
7 company, the Commission's final language found that an entity, for-profit or otherwise, that sold
8 FEC data in a software upgrade or as a separate service would be in violation of the Act.
9 See AO 2004-24 at 3. Therefore, based on AO 2004-24, the Commission has already determined
10 that commercial sale of a software upgrade that includes FEC data constitutes a commercial use
11 of FEC data. See AO 2004-24 at 3-4.

12 The phrase knowing and willful indicates that "actions [were] taken with full knowledge
13 of all of the facts and a recognition that the action is prohibited by law." 122 Cong. Rec. H 2778
14 (daily ed. May 3, 1976); see also *Federal Election Comm'n v. John A. Dramesi for Cong.*
15 *Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986) (distinguishing between "knowing" and "knowing
16 and willful"). A knowing and willful violation may be established "by proof that the defendant
17 acted deliberately and with knowledge" that an action was unlawful. *United States v. Hopkins*,
18 916 F.2d 207, 214 (5th Cir. 1990). The court also found that the evidence did not have to show
19 that a defendant "had specific knowledge of the regulations" or "conclusively demonstrate" a
20 defendant's state of mind," if there were "facts and circumstances from which the jury reasonably
21 could infer that [the defendant] knew her conduct was unauthorized and illegal." *Id.* at 213
22 (quoting *United States v. Bordelon*, 871 F.2d 491, 494 (5th Cir.), *cert. denied*, 439 U.S. 838
23 (1989)). Here, Aristotle was aware of the Commission's conclusion in AO 2004-24, as

evidenced by its use of the final Advisory Opinion in its marketing materials, yet Aristotle continued to use FEC data in its software upgrade and used its software upgrade for commercial purposes. *See* Compl., Exhibit 4.

Accordingly, based on all the facts above, we recommend that the Commission find reason to believe that Aristotle International Inc. knowingly and willfully violated 2 U.S.C.

§ 438(a)(4).

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V. RECOMMENDATIONS

1. Find reason to believe that Aristotle International Inc. knowingly and willfully violated 2 U.S.C. § 438(a)(4).
2. Approve the attached Factual and Legal Analysis.
3.
4. Approve the appropriate letters.

Lawrence H. Norton
General Counsel

11/15/05
Date

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